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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

v.

FRED ARMBURG, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, IN THE COUNTY OF SUFFOLK AND STATE OF MASSACHUSETTS, AND SUPPORTING BRIEF.

PHILIP N. JONES,
HURLBURT, JONES & HALL,
Attorneys for Petitioner.

(36,291)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

v.

FRED ARMBURG, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, IN THE COUNTY OF SUFFOLK AND STATE OF MASSACHUSETTS.

To the Honorable the Supreme Court of the United States:

The Boston and Maine Railroad, a corporation established under the laws of the State of Massachusetts, having a usual place of business in Boston in the State of Massachusetts and engaged in operating a railroad in both interstate and intrastate commerce in Massachusetts and other States, respectfully prays for a writ of certiorari to be directed to the Municipal

Court of the City of Boston in said State of Massachusetts, to review a cause in that court wherein Fred Armburg of Acton in the County of Middlesex is plaintiff and your petitioner is defendant, and wherein final judgment was entered for the respondent herein, the plaintiff below, in the sum of $28,893.41 on the 25th day of September, 1931 (R. p. 3).

The petitioner and the respondent are hereinafter respectively referred to as the defendant and the plaintiff.

The said Municipal Court of the City of Boston, which rendered the judgment, is the highest court of the State wherein a decision could be had.

At the time of the injury on account of which the plaintiff sued as hereinafter stated, the Workmen's Compensation Act, Massachusetts General Laws, Chapter 152, provided for the taking of insurance by employers against injury to their employees in various amounts according to the nature of the injury.

Certain sections and portions of sections of said Chapter are as follows:

> SECTION 21. Every insured person shall, as soon as he secures a policy, give written or printed notice to all persons under contract of hire with him that he has provided for payment to injured employees by the insurer.
>
> SECTION 22. Every insured person shall give written or printed notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the insurer.
>
> SECTION 24. An employee of an insured person shall be held to have waived his right of

action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance.

SECTION 26. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury.

Sections 28, *et seq.*, regulate the amount and duration of compensation in case of injury.

Insurance by an employer is not made compulsory, but an employer who does not insure is, by Sections 66 and 67, in an action at common law by his employee, deprived of the common law defenses of contributory negligence, negligence of a fellow-employee and assumption of the risk.

SECTION 66. In an action to recover damages for personal injuries sustained by an employee

in the course of his employment, or for death resulting from personal injury so sustained it shall not be a defense:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury.

SECTION 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person.

The cause in which the judgment was entered was an action of tort at common law, in which the plaintiff sought to recover damages for injuries sustained by him in this Commonwealth by reason of the alleged negligence of the defendant, its agents and servants (R. p. 4).

The defendant set up in its answer, *inter alia*, that the plaintiff's injuries were due solely to the negligence of a fellow servant and that the plaintiff assumed the risk of the same (R. p. 4).

The defendant, at the time of the plaintiff's injury, was a common carrier of goods and passengers for hire and owned or leased railroad tracks which it used in its business. Its tracks extended from point to point within the State of Massachusetts and also from points in Massachusetts to points in various other States specified, and it was engaged in the business of transporting both freight and passengers over such

tracks from point to point within the State of Massachusetts and from points within that State to points in other States and from points in other States to points in Massachusetts (R. p. 5).

The plaintiff, who was an employee of the defendant (R. p. 5), was not employed in interstate commerce at the time of his injury but was employed in intrastate commerce (R. p. 5). The defendant was not a subscriber under the provisions of the Massachusetts Workmen's Compensation Act (R. p. 5), *i. e.*, it had not provided by insurance for compensation to its employees in case of injury.

The defendant requested the court to rule that the Workman's Compensation Act, Massachusetts General Laws, c. 152, and Section 66 thereof, did not apply to the defendant, a railroad corporation engaged in both intrastate and interstate commerce (R. p. 24). It also requested a ruling that if said act and section 66 thereof be construed as applying to the defendant, a railroad corporation engaged in both intrastate and interstate commerce, it was in violation of the Commerce Clause, Art. I, Sec. 8 of the Constitution of the United States, and that for these reasons the defense that the plaintiff's injuries were caused by the negligence of a fellow servant was open to the defendant (R. p. 24), and the plaintiff was not entitled to recover (R. p. 24).

The trial court found that the cause of the plaintiff's injuries was the negligence of a fellow servant, refused the foregoing requests for rulings, found for the plaintiff in the sum of $26,500, and reported the defendant's requests for rulings to the Appellate Divi-

sion of the Municipal Court for determination (R. pp. 25-26).

The Appellate Division entered a final order dismissing the report (R. p. 24), holding in its opinion (R. p. 28) that the provisions of the Compensation Act applied to a railroad corporation operating in both interstate and intrastate commerce and, in effect, that the act was not intended by the Legislature to require insurance upon risks incident to interstate commerce, did not therefore place a burden upon interstate commerce, and therefore that the defense that the injury was caused by the negligence of a fellow employee was not open to the defendant (R. pp. 28-30). The defendant appealed to the Supreme Judicial Court of the State of Massachusetts from the order of the Appellate Division dismissing the report (R. p. 28).

The Supreme Judicial Court entered a rescript affirming the order of the Appellate Division dismissing the report (R. p. 31), and on September 25, 1931, the Municipal Court of the City of Boston entered the judgment in question (R. p. 3).

In its opinion (Mass. Adv. Sheets, 1931, p. 1751), the Supreme Court, although recognizing that it may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic (Mass. Adv. Sheets, 1931, p. 1757, Opinion, p. 37), held that the act in question applied to the defendant as to its employees while engaged in intrastate commerce (Mass. Adv. Sheets, 1931, p. 1758, Opinion, p. 38), and that as so construed it did not violate the Commerce Clause

of the Federal Constitution (Mass. Adv. Sheets, 1931, pp. 1759-1761, Opinion, pp. 38-41).

The court in its opinion ruled that, under the terms of the act as construed, if the defendant insured in conformity thereto, it need not insure its employees so far as engaged in interstate commerce, and can gain whatever advantages arise from the acceptance of the act by confining its insurance strictly to its employees to the extent that they are engaged in intrastate commerce, and is therefore required to pay premiums based not on its entire payroll, but only on the part allocated to intrastate commerce; that any effect of such premiums on interstate commerce would be merely incidental and would not infringe upon the Commerce Clause of the Constitution (Mass. Adv. Sheets, 1931, p. 1760, Opinion, p. 40).

The reasons relied upon for the allowance of the writ are as follows:

1. The Massachusetts Workmen's Compensation Act, Massachusetts General Laws, chapter 152, as construed in the instant case, requires railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in intrastate commerce, or be subjected to actions at law without the benefit of the common law defenses of contributory negligence, assumption of the risk and negligence of a fellow servant.

Classification, for the purposes of such insurance, of the employees of a railroad engaged in both interstate and intrastate commerce between those engaged in interstate commerce and those engaged in intra-

state commerce and the separation of the employees' services as between the two classes of commerce, so that such a railroad can insure its employees in so far as they are engaged in intrastate commerce, without burdening interstate commerce, is impossible.

The Workmen's Compensation Act in so far as it requires a railroad engaged in both interstate and intrastate commerce to insure its employees to the extent that they are engaged in intrastate commerce, or otherwise be subjected to actions at common law without the benefit of the said common law defenses, is in violation of the Commerce Clause, Art. I, Sec. 8, of the Constitution of the United States, in that it imposes a burden upon interstate commerce, and in an action by an employee against a non-insuring railroad corporation engaged in both interstate and intrastate commerce such common law defenses are open to the railroad, and were open to the defendant in the instant case.

2. Even if it were not impossible for a railroad corporation engaged in both interstate and intrastate commerce to insure to the extent that its employees are engaged in intrastate commerce, the burden involved in the segregation of the services and risks referrable to such intrastate commerce and the requirement that such a railroad shall so insure or be subjected to actions at common law for injuries received by its employees, without the benefit of the common law defenses in question, constitutes a burden upon interstate commerce in violation of the Commerce Clause, Art. I, Sec. 8 of the Constitution of the United

States, and in an action by an employee against such a railroad corporation the defenses of contributory negligence, assumption of the risk and negligence of a fellow servant are open to the defendant, and were so open in the instant case.

3. The general reasons for the allowance of the writ are the public importance of the questions involved and the fact that they have not heretofore been determined by this Court.

BOSTON AND MAINE RAILROAD,
Petitioner,

By Its Attorneys,
PHILIP N. JONES,
HURLBURT, JONES & HALL.

INDEX TO BRIEF IN SUPPORT OF PETITION.

Section		Page
1	Opinion of the courts below	1
2	Jurisdiction	1
3	Statement of case	3
4	Specification of errors	5
5	Argument	6

STATUTES.

Constitution of United States, Art. I, Sec. 8	12
Act April 22, 1908, C. 149, Sec. 1, 35 Stat., 65	12
Portions of Massachusetts General Laws, Chap. 152	12

CASES CITED.

Armburg v. Boston & Maine R. R., Mass. Adv. Sheets, 1931, p. 1751	5, 9
Baltimore & Ohio R. R. v. Interstate Commerce Commission, 221 U. S., 612	7, 8
Houston & Texas Ry. v. United States, 234 U. S., 342	8
International Paper Co. v. Commonwealth of Massachusetts, 246 U. S., 135	8, 10
Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S., 194	7
Minnesota Rate Cases, 230 U. S., 352	9
Sherlock v. Alling, 93 U. S., 99	9
Southern Railway Co. v. United States, 222 U. S., 20	7, 8
Young v. Duncan, 218 Mass., 346	10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 477

BOSTON AND MAINE RAILROAD, PETITIONER,

v.

FRED ARMBURG, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

1. The opinion in the Supreme Judicial Court of Massachusetts was filed September 12, 1931, and is reported in Mass. Adv. Sheets, 1931, page 1751. It is included at page 33 of the record. The opinion of the Appellate Division of the Municipal Court of the City of Boston is included at page 28 of the record.

Jurisdiction.

2. Jurisdiction to review this cause exists under Judicial Code, Sec. 237 (*b*) as amended by Act of February 13, 1925, C. 229, Sec. 1, 43 Stat. 937.

The date of entry of the judgment in the cause sought to be reviewed was September 25, 1931 (R. p. 3). The judgment was rendered by the Municipal Court of the City of Boston, the highest court of the state in which a decision could be had.

The statute of the State of Massachusetts, the validity of which was drawn in question, is the Workmen's Compensation Act, so-called, Massachusetts General Laws, chap. 152, which provides that an employer may provide by insurance for the payment to his employees of compensation for injury arising in the course of their employment (Secs. 21, 22, 26), and that unless an employee of an insured person gives his employer notice that he claims his right of action at common law, he shall be held to have waived it (Sec. 24), and if injured is entitled to compensation from the insurer according to the nature of his injury, and further provides that in case an employer does not so insure—

> SECTION 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:
>
> 1. That the employee was negligent;
>
> 2. That the injury was caused by the negligence of a fellow employee;
>
> 3. That the employee had assumed the risk of the injury.
>
> Section 67. The preceding section shall not apply to actions * * * for * * * injuries received by employees of an insured person.

Other material portions of this statute are set forth in the appendix (p. 12 *infra*).

This statute, and Section 66 thereof, is claimed to be in violation of the Commerce Clause, Art. I, Sec. 8, of the Constitution of the United States, as applied to the defendant, a railroad corporation engaged in both interstate and intrastate commerce, it having been construed by the Courts below to apply to the defendant (Rulings of Municipal Court, R. pp. 23-26, Opinion of Appellate Division, R. pp. 28-30, Opinion Supreme Court of Massachusetts, Mass. Adv. Sheets, 1931, p. 1751).

Statement of Case.

3. The cause was an action of tort at common law, in which the plaintiff sought to recover damages for injuries sustained by him in this Commonwealth by reason of the alleged negligence of the defendant, his employer, its agents and servants (R. p. 4).

The defendant set up in its answer that the plaintiff's injuries were due solely to the negligence of a fellow servant and that the plaintiff assumed the risk of the same (R. p. 4).

The defendant, a railroad corporation, was a common carrier of goods and passengers for hire and as such carrier was engaged in both interstate and intrastate commerce (R. p. 5).

The plaintiff, who was an employee of the defendant (R. p. 5), was not employed in interstate commerce at the time of his injury, but was engaged in intrastate commerce (R. p. 5). The defendant was not a subscriber under the provisions of the Work-

men's Compensation Act (R. p. 5), *i. e.*, it had not provided by insurance for compensation to its employees in case of injury.

The defendant requested the Court to rule that the Workmen's Compensation Act, Massachusetts General Laws, chap. 152, and Section 66 thereof, did not apply to the defendant, a railroad corporation engaged in both interstate and intrastate commerce (R. p. 24).

It also requested a ruling that if said act and section 66 thereof be construed as applying to the defendant, a railroad corporation engaged in both intrastate and interstate commerce, it was in violation of the Commerce Clause, Art. I, Sec. 8, of the Constitution of the United States, and that for these reasons the defense that the plaintiff's injuries were caused by the negligence of a fellow servant was open to the defendant (R. p. 24) and the plaintiff was not entitled to recover (R. p. 24).

The trial court found that the cause of the plaintiff's injuries was the negligence of a fellow servant, refused the foregoing requests for rulings, found for the plaintiff in the sum of $26,500, and reported the defendant's requests for rulings to the Appellate Division of the Municipal Court for determination (R. pp. 25-26).

The Appellate Division entered a final order dismissing the report (R. p. 24), and the defendant appealed to the Supreme Judicial Court of Massachusetts from the order of the Appellate Division (R. p. 28). That Court entered a rescript affirming to order of the Appellate Division dismissing the report

(R. p. 31), and judgment was entered for the plaintiff by the Municipal Court of the City of Boston in the sum of $28,843.91 (R. p. 3).

In its opinion the Supreme Court of the State held the act to be applicable to the defendant as to its employees while engaged in intrastate commerce only, and as so construed, not to be in violation of the Commerce Clause of the Federal Constitution.

Armburg v. Boston & Maine Railroad, Mass. Adv. Sheets, 1931, pp. 1758-1760 (Opinion pp. 38-41).

Specification of Errors.

4. (1) The court below erred in ruling and holding that Massachusetts General Laws, Chapter 152 and Section 66 thereof, requiring railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in intrastate commerce, or be subject to actions at common law without the benefit of the common law defenses of negligence of fellow servants, assumption of the risk and contributory negligence are not in violation of the Commerce Clause, Art. I, Sec. 8 of the Constitution of the United States and void, and that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant.

(2) The court below erred in ruling and holding that Massachusetts General Laws, Chapter 152 and Section 66 thereof, requiring railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in inter-

state commerce, or be subject to actions at common law without the benefit of the common law defenses of negligence of fellow servants, assumption of the risk and contributory negligence, are not in violation of the Commerce Clause, Art. I, Sec. 8 of the Constitution of the United States, and void.

(3) For the above reasons the Court below erred in ruling and holding that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant, and in entering judgment for the plaintiff.

The Commerce Clause of the Constitution of the United States, Section 1 of the Federal Employers' Liability Act, and certain portions of Mass. General Laws, Chap. 152, Massachusetts Workmen's Compensation Act, are set forth in an appendix to this brief.

ARGUMENT.

5. The segregation, for the purposes of insurance, of the services of the defendant's employees to the extent that they pertain to intrastate commerce, and the insurance of its employees to the extent only that they are engaged in intrastate commerce, is an impossibility.

Service as affecting the two classes of commerce are so interwoven that allocation is out of the question.

Illustrations are so obvious that specific mention of them would be superflous. Some of them are mentioned in the cases cited.

That this is a matter of common knowledge is recognized by the decisions of this Court.

Baltimore & Ohio R. R. v. Interstate Commerce Commission, 221 U. S. 612, 618.
Southern Railway Co. v. United States, 222 U. S. 20, 27.
Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 213.

These considerations apply with peculiar force to the case of any attempted insurance of such a carrier's employees to the extent only that they are engaged in one kind of traffic or the other. The extent to which an employee has in a given period acted with respect to intrastate commerce is obviously impossible of determination in cases where his services may pertain to both classes of traffic.

But in the administration of the insurance provisions of the act such determination has to be made in advance, and under the act risks and premiums are classified.

Section 52. (See appendix page 14, *infra*.)

The impossibility of determining the extent to which an employee will act with respect to intrastate commerce in a given period in the future, and the degree of risk referrable to such intrastate service, is therefore even more apparent.

Decisions arising under the Federal Employers' Liability Act, determining that an employee is acting with respect to one kind of commerce or another, have no bearing.

While it may be possible, though difficult, in a given case, to determine whether an employee is engaged at a specific time in intrastate or interstate commerce,

determination of the extent to which each employee will for a given period in the future affect intrastate commerce only is manifestly out of the question.

Inasmuch as for the purposes of insurance of employees their employment as to the two classes of commerce cannot be severed, anything affecting the one class of commerce by its necessary operation affects the other class and a direct burden upon the one operates as a direct burden upon the other.

And the Congress having legislated with respect to the liability of employees engaged in interstate commerce.

> *Federal Employers' Liability Act,* Apr. 22, 1908, c. 149, §1, 35 Stat. 65,

the State statute in question, inasmuch as in view of the considerations mentioned, it directly burdens interstate commerce, is in violation of the Commerce Clause of the Federal Constitution.

> *Houston & Texas Railway v. United States,* 234 U. S. 342, 351.
>
> *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission,* 221 U. S. 618.
>
> *Southern Railway Co. v. United States,* 222 U. S. 20, 26.
>
> *International Paper Co. v. Commonwealth of Massachusetts,* 246 U. S. 135.

The Supreme Court of the State in its opinion, although recognizing to some extent the impossibility of classifying or separating the two kinds of traffic for the purposes under consideration, failed to give effect to the consequences flowing therefrom.

We quote passages from the opinion:

> "It is often a question of difficulty whether a particular injury arose out of intrastate or interstate commerce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business."
>
> *Armburg v. Boston & Maine R. R.*, Mass. Adv. Sheets, 1931, p. 1756.

> "It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required."
>
> Mass. Adv. Sheets, 1931, p. 1757.

> "If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce."
>
> Mass. Adv. Sheets, 1931, p. 1760.

The instant case is to be distinguished from those in which the effect of State legislation upon interstate commerce is held indirect and remote;

Sherlock v. Alling, 93 U. S. 99;

The Minnesota Rate Cases, 230 U. S. 352,

but comes within the principle applied in *International Paper Co. v. Commonwealth of Massachusetts,* 246 U. S. 135, wherein the Court say, at page 141:

> "Under the commerce clause exclusive power to regulate interstate commerce rests in Congress and a State statute which either directly or by its necessary operation burdens such commerce is invalid regardless of the purpose with which it was enacted."

Moreover, the labor and expense of attempting to segregate the services of its employees, with respect to the two kinds of traffic, imposed upon the railroad, and therefore imposed in part upon interstate commerce, constitutes a burden thereon, and for this additional reason the act violates the constitutional provision referred to.

Although under the act, insurance is not compulsory, the only alternative is that of being deprived in an action at law of the common law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant. Failure to insure is thus penalized by the withdrawal of such defenses.

Young v. Duncan, 218 Mass. 346,

wherein the Court say with reference to the Act at page 349:

> "It was not made compulsory in its application but inducements were held out to facilitate its voluntary acceptance by both employers and employees."

Inasmuch, therefore, as under the act the failure to insure is penalized by the withdrawal of the common

law defenses, and the insurance requirements are invalid as applied to the defendant, the attempted withdrawal of the common law defenses by Section 66 is ineffectual, such defenses were open to the defendant at the trial, and upon the findings of the Municipal Court that the injury was caused by a fellow servant (R. p. 26), the defendant was entitled to judgment.

Respectfully submitted,

PHILIP N. JONES,
HURLBURT, JONES & HALL,
Attorneys for Petitioner.

APPENDIX.

Statutes.

Constitution of United States, Article I, Section 8.

The congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; * * * and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Act Apr. 22, 1908, *c.* 149, §1, 35 *Stat.* 65.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

Massachusetts General Laws, Chap. 152.

SECTION 1. The following words as used in this

chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:

* * * * * * *

(4) "Employee", every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer. * * *

* * * * * * *

(6) "Insured" or "insured person", an employer who has provided by insurance for the payment to his employees of the compensation required by this chapter.

(7) "Insurer", any insurance company which has insured the compensation payable by an employer under this chapter.

SECTION 21. Every insured person shall, as soon as he secures a policy, give written or printed notice to all persons under contract of hire with him that he has provided for payment to injured employees by the insurer.

SECTION 22. Every insured person shall give written or printed notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the insurer. * * *

SECTION 24. An employee of an insured person shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given

his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. * * *

SECTION 26. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury. * * *

SECTION 52. Any insurance company authorized to transact business in this commonwealth under subdivision (*b*) or (*e*) of the sixth clause of section forty-seven of chapter one hundred and seventy-five may, except as provided in clause (*c*) of section fifty-four of said chapter, insure the payment of the compensation provided for by this chapter, and when any such company insures the payment of such compensation it shall file with the commissioner of insurance its classifications of risks and premiums relating thereto and subsequent proposed classifications or premiums, which shall not take effect until approved by the commissioner of insurance as adequate and reasonable for the risks to which they respectively apply; provided, that upon petition of the company or any other party aggrieved the opinion of the commissioner shall be subject to review by the supreme judicial court. The commissioner may withdraw his approval.

SECTION 54. Policies of workmen's compensation insurance issued or delivered in the commonwealth shall cover separately and for a separate consideration all the liabilities which are imposed upon an insurer by this chapter, whatever other contingencies may be insured by riders attached thereto or endorsements thereon. * * *

SECTION 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury.

SECTION 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person.

SECTION 68. Chapter one hundred and fifty-three and sections four and seven to ten, inclusive, of chapter two hundred and twenty-nine shall not apply to employees of an insured person. * * *

Chapter 153, referred to in Section 68, is the State Employers' Liability Act, so-called, which abrogated the common law defenses in cases involving the negligence of superintendents and certain others in authority.

Sections 4 and 7 to 10 of Chapter 229 provide remedies in cases of death resulting from injuries for which the employer is liable under Chapter 153.

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CHARLES ELMOR

Supreme Court of the United States.

October Term, 1931.

No. 477.

Boston and Maine Railroad,
Petitioner,

v.

Fred Armburg,
Respondent.

On Writ of Certiorari to the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts.

MOTION TO AMEND PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

PHILIP N. JONES,
HURLBURT, JONES & HALL,
Counsel for the Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 477.

BOSTON AND MAINE RAILROAD,
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RESPONDENT.

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

MOTION TO AMEND PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

Now comes the Boston and Maine Railroad, petitioner in the above-entitled cause, and moves to amend its petition for a writ of certiorari by adding to the statement in the petition of the reasons relied upon for the allowance of the writ (Petition, pp. 7-9) the following reasons:

1 (*a*). The Massachusetts Workmen's Compensation Act, Massachusetts General Laws, c. 152, in so far as it provides that railroads engaged in both interstate and intrastate commerce shall insure their employees against injury received in the course of their employment to the extent that

their employees are engaged in intrastate commerce, and, in event of their failure to do so, subjects them to actions at law without the benefit of the common-law defenses of contributory negligence, assumption of the risk, and negligence of a fellow servant, is in conflict with and violates the Commerce Clause, art. I, sec. 8, of the Constitution of the United States, and the laws of Congress enacted by virtue of the power thereby conferred, and is invalid, and in an action by an employee against a railroad corporation engaged in both interstate and intrastate commerce which has not insured its employees in accordance with said Workmen's Compensation Act, such common-law defenses are open to the railroad, and were open to the defendant in the instant case.

1 (*b*). The Massachusetts Workmen's Compensation Act, Massachusetts General Laws, c. 152, in so far as it provides that railroads engaged in both interstate and intrastate commerce shall insure their employees against injury received in the course of their employment to the extent that their employees are engaged in intrastate commerce, and, in event of their failure to do so, subjects them to actions at law without the benefit of the common-law defenses of contributory negligence, assumption of the risk, and negligence of a fellow servant, is in conflict with and violates the Act of Congress, April 22, 1908, c. 149, commonly known as the Federal Employers' Liability Act, the Acts of Congress relative to the installation and use of safety appliances and equipment upon locomotive engines and cars employed in interstate commerce, namely, the Act of March 2, 1893, c. 196; the Act of March 2, 1903, c. 976; the Act of April 14, 1910, c. 160; the Act of May 30, 1908. c. 225; the Act of February 17, 1911, c. 103; the Act of June 7, 1924, c. 355; and Act of March 4, 1907, c. 2939, entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees thereon," and is invalid, and in an action by an employee against a railroad corporation engaged in both interstate and intrastate commerce which

has not insured its employees in accordance with said Workmen's Compensation Act, such common-law defenses are open to the railroad, and were open to the defendant in the instant case.

The petitioner also moves to amend the specification of errors contained in the brief in support of its said petition for certiorari (Brief, pp. 5, 6) by adding thereto the following specifications of error:

4. The Court below erred in ruling and holding that Massachusetts General Laws, c. 152, and section 66 thereof, requiring railroads engaged in both interstate and intrastate commerce to insure their employees against injury arising in the course of their employment to the extent that their employees are engaged in intrastate commerce, and, in event of their failure to so insure, subjecting them to actions at law without the benefit of the common-law defenses of assumption of the risk, contributory negligence, and negligence of a fellow servant are not in conflict with and in violation of the Commerce Clause, art. I, sec. 8, of the Constitution of the United States and the laws of Congress enacted by virtue of the power thereby conferred, and invalid and void.

5. The Court below erred in ruling and holding that Massachusetts General Laws, c. 152, and section 66 thereof, requiring railroads engaged in both interstate and intrastate commerce to insure their employees against injury arising in the course of their employment to the extent that their employees are engaged in intrastate commerce, and, in event of their failure to so insure, subjecting them to actions at law without the benefit of the common-law defenses of assumption of the risk, contributory negligence, and negligence of a fellow servant are not in conflict with and in violation of the Act of Congress April 22, 1908, c. 149, commonly known as the Federal Employers' Liability Act, the Acts of Congress relative to the installation and use of safety appliances and equipment upon locomotive engines and cars employed in

interstate commerce, namely, the Act of March 2, 1893, c. 196; the Act of March 2, 1903, c. 976; the Act of April 14, 1910, c. 160; the Act of May 30, 1908, c. 225; the Act of February 17, 1911, c. 103; the Act of June 7, 1924, c. 355; and Act of March 4, 1907, c. 2939, entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees thereon," and invalid and void.

6. For the above reasons the Court below erred in ruling and holding that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant, and in entering judgment for the plaintiff.

Statement of Reasons.

The petition in this case asserts the invalidity of the Massachusetts Workmen's Compensation Act, which provides that employers shall insure their employees against injury received in the course of their employment, and, in case they do not do so, subjects them to actions at common law without the benefit of the defenses of assumption of the risk, contributory negligence, and negligence of a fellow servant. This act was construed by the Supreme Judicial Court of Massachusetts to require railroads engaged in both interstate and intrastate commerce to insure its employees to the extent that they are engaged in intrastate commerce (r. p. 40), and as so construed was held not to burden interstate commerce or violate the Commerce Clause of the Federal Constitution (Opinion of Supreme Court, r. pp. 39-40).

The reasons in terms assigned in the petition for the allowance of the writ are that the state statute as construed constitutes a burden upon interstate commerce in violation of the Commerce Clause of the Federal Constitution, and that the defenses of contributory negligence, assumption of the risk, and negligence of a fellow servant were open to the defendant at the trial (Petition, pp. 7-9).

The specification of errors in the supporting brief alleges error in the rulings of the Court below that the statute does not violate the Commerce Clause of the Constitution, and that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant, and in entering judgment for the plaintiff (Supporting Brief, pp. 5, 6).

This Court has held that, where Congress has legislated with respect to the rights and remedies of employees engaged in interstate commerce, the operation of state laws is excluded, even in cases where the employee is also by the same act engaged in intrastate commerce—

New York Central R.R. v. *Winfield,* 244 U.S. 147—

and that where an employee is injured by reason of a violation of the so-called Federal Safety Appliance Act his rights and remedies are governed by that act even although he is engaged exclusively in intrastate commerce.

Texas & Pacific Ry. Co. v. *Rigsby,* 241 U.S. 33.

While it is believed that, under the petition as it stands, all questions as to the validity of the state statute by reason of its effect upon interstate commerce in view of existing laws of Congress enacted pursuant to its power under the Commerce Clause are open, and that the petitioner is not limited to the contention that the statute is unconstitutional by reason of conflict with the Commerce Clause itself, irrespective of such existing laws of Congress, yet the petitioner has in mind the statements of this Court that, on certiorari, it will at the argument feel called upon to consider only the grounds presented in the petition.

The petitioner therefore desires to amend the petition as requested, so that upon the argument the question as to the validity of the state statute, in view of such existing laws of